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ZONING—JUDICIAL REVIEW OF PLANNING AND ZONING DECISIONS IN KENTUCKY

I. INTRODUCTION

One of the most serious and difficult problems in land planning today is the extent of control courts exercise over the decisions of "planners" by way of judicial review. It is the purpose of this note to examine what the Kentucky courts review in fact, as well as what decisions they ought to review. For the most part, discretionary phases of administrative functions which are subject to review by trial de novo will be considered; however, other types of review, including that which is exercised over the legislative phase of planning and zoning as evidenced by municipal ordinances, will also be discussed.¹

A. Statutory Outline

There are three primary categories, based on city classifications, into which Kentucky planning and zoning statutes are divided. Subsequent reference to Category 1, Category 2, or Category 3, will relate to the appropriate classification as follows:

(1) *Category 1*—Provisions pertaining to cities of the first class and counties containing such cities.²

(a) Agencies

KRS section 100.032 authorizes first class cities and counties in which they are located to create a joint city-county planning and zoning commission,³ and a joint board of zoning adjustment and appeals.⁴ Authority to enact zoning regulations is reserved to the city legislative body and county fiscal court.⁵

(b) Judicial Review

A unique provision contained in the statutes permits an appeal to the circuit court for de novo "review" of any action or decision by

¹For a general discussion of judicial control and review of proceedings for variances and exceptions to zoning regulations, see Annot., 168 A.L.R. 13, 130-56 (1947).

²Ky. Rev. Stat. (hereinafter referred to as KRS) §§ 100.031-.098 (1959).

³The commission's duties include the preparation and amendment of a comprehensive plan. See KRS §§ 100.044-.049, .052-.056, .058, .066, .078 (1959). The commission also has extensive power over subdivision control. See KRS §§ 100.088-.094 (1959). The commission may be given authority to consider and dispose of various matters pertaining to designated construction projects. See KRS §§ 100.059-.062, .065 (1959). Furthermore, it may appoint a zoning enforcement officer to administer zoning regulations and restrictions, and to issue zoning permits and certificates of occupancy. KRS § 100.074 (1959).

⁴The board may hear, decide, and enforce cases taken on appeal from the action or decisions of a zoning enforcement officer. KRS §§ 100.076, .082 (1), .082 (4) (1959). The board may also grant variances and exceptions to zoning regulations, in addition to interpreting zoning maps and making decisions on special zoning questions. See KRS §§ 100.082 (2)-(3) (1959).

⁵KRS § 100.067 (1959).

the commission with respect to approval of adjustments to the master plan.⁶ Any action or decision of the commission in approving or disapproving certain construction projects may also be reviewed *de novo*.⁷ Adjustments to the original zoning plan are subject to the same procedure as adjustments to the master plan,⁸ and commission decisions with respect to approval of subdivision plats are similarly subject to a *de novo* review.⁹ Likewise, an appeal from any decision, ruling, or order by the board of adjustment and appeal may also be reviewed upon a *de novo* hearing.¹⁰

(2) *Category 2*—Provisions pertaining to cities of the second class and counties containing such cities.¹¹

(a) Agencies

Second class cities and counties in which they are located may establish a planning commission,¹² composed of city and county representatives, for the city and county area.¹³ Thereafter, provision must be made for a board of adjustment¹⁴ to hear and decide various appeals and applications for variances and special exceptions.¹⁵

⁶ KRS § 100.057 (1959). The language of this section could be more precise. Although it seems to expressly authorize appeals from any decision or action of the commission, the section heading is captioned, "Appeal to courts from decision of commission on question of approving adjustments." In context, "adjustments" seem to refer to adjustments in the master plan, since that plan is discussed in the five sections preceding KRS § 100.057.

In the absence of delegation to the commission, the city legislative body and/or county fiscal court must approve or disapprove proposed adjustments. KRS § 100.052 (1959). There is no indication as to how approval must be made, or whether it may be reviewed upon a trial *de novo*.

⁷ KRS §§ 100.059, .063-.065 (1959). These sections raise a problem similar to that in note 6 *supra*. In the absence of delegation to the commission, the city legislative body or county fiscal court must give approval by appropriate order, resolution or proposal. There is no provision for a review by trial *de novo*. In this connection, see note 58 *infra* and accompanying text.

⁸ KRS § 100.066 (1959).

⁹ KRS § 100.089 (1959).

¹⁰ KRS § 100.085 (1959).

¹¹ KRS §§ 100.320-.490 (1959).

¹² The commission may prepare, make, or approve a comprehensive plan, various aesthetic recommendations, and a zoning plan with supplementary regulations and restrictions. KRS §§ 100.350-.351 (1959). The commission exercises control over the adoption of a master plan, and over approval of construction work, subdivision plats, and dedications of land, as well as reservations of land for future acquisition. See KRS §§ 100.353-.354, .360-.364 (1959). The commission is also charged with the responsibility of making certain reports to be acted upon by the appropriate legislators. See KRS §§ 100.390-.410 (1959). Similarly, the commission must approve changes to established plans before they are adopted by the legislators, KRS § 100.420 (1959). With respect to requests for approval of subdivision plats, a planning commission in Category 1 or 3 must act thereon with a specified period of time. KRS §§ 100.088, .750 (1959). Category 2 has no similar provision.

¹³ KRS §§ 100.320,.330(1) (1959).

¹⁴ KRS § 100.430 (1959).

¹⁵ KRS §§ 100.450-.470 (1959). A variance from the terms of an ordinance is authorized where a literal enforcement of its provisions would result in unnecessary hardship. Variances are generally of two kinds: use variance and height,

(b) Judicial Review

The scope of judicial review in this category is, oddly, more limited than in first class cities. A final order by the board of adjustment may be appealed by petition to the circuit court for a review limited to a determination of whether the board acted *ultra vires*, whether its decision was procured deceitfully, or whether it was rendered in accordance with various zoning requirements.¹⁶ Generally, the review is limited to a hearing based on the record certified by the board, and no new evidence may, as a rule, be introduced.¹⁷ There is no provision for review of the commission's activities.

(3) *Category 3*—Provisions pertaining to cities of the third, fourth, fifth and sixth classes, and counties containing such cities.¹⁸

(a) Agencies

In promulgating zoning ordinances and regulations, cities of the third through sixth classes *must* create an advisory *zoning* commission,¹⁹ and *may* create a board of adjustment²⁰ and a *planning* commission.²¹

(b) Judicial Review

Apart from appeals to contest awards of compensation which are made upon the reservation of land for street locations,²² the only provision for judicial review in this category relates to petitions for a writ of certiorari directed to the circuit court for review of a decision by the board of adjustment.²³ The circuit court, upon granting the writ, is not limited to a review upon the record certified by the board, but may take additional evidence.²⁴ There is no provision to review activities of either the planning or zoning commission.

bulk and area variance. The first permits a use otherwise prohibited in a district, whereas the latter merely permits a more intensive use of land. An exception in a zoning ordinance is one allowable where facts and conditions detailed in the ordinance are found to exist. Horack & Nelan, *Land Use Controls* 176 (1955).

¹⁶ KRS §§ 100.480-.490 (1959).

¹⁷ KRS § 100.490 (1) (1959).

¹⁸ KRS §§ 100.500-.830 (1959).

¹⁹ KRS § 100.550 (1959). The zoning commission is empowered to hold hearings and make various recommendations or reports.

²⁰ KRS § 100.560 (1959). The board may grant variances or special exceptions, and hear appeals from decisions of zoning officers. See KRS §§ 100.570, .580 (1959).

²¹ KRS § 100.610 (1959). The planning commission has authority to make and adopt a master plan, approve various types of construction work, promote public relations, control subdivision development, and recommend that land be reserved for future acquisition and use as public streets. See KRS §§ 100.650, .670-.690, .720-.750, .790 (1959). Once a planning commission is created, the powers and records of any existing zoning commission are merged therein. KRS § 100.710 (1959).

²² KRS § 100.820 (1959).

²³ KRS § 100.590 (1959).

²⁴ KRS § 100.590 (4) (1959).

B. General Background

As the foregoing statutory outline would tend to indicate, any examination of Kentucky's planning and zoning laws must consider numerous variable factors before cases and comments therein take on meaningful perspective. By way of summary, the more apparent factors include:

(1) The enabling act: Authority for municipal, or municipal-county, exercise of planning and zoning functions is delegated by KRS Chapter 100. Inasmuch as the Kentucky planning and zoning laws were revamped in 1942,²⁵ the outcome of a case may depend on the particular enabling act in force at the time.

(2) City classification: The pre-1942 planning and zoning statutes applied only to cities of the first and second class. Now, however, the statutes apply to cities of the third through sixth class as well, and matters of substance, procedure, discretion, and review may depend upon the classification of a particular city involved.

(3) Planning authority involved: When discussing the extent of control which courts do or should exercise over "planners," that term may encompass at least three broad and distinct groups: viz., the appropriate legislative body which may enact ordinances or promulgate orders and resolutions; the planning and/or zoning commission; and the board of adjustments. The outcome of a case may well depend upon which agency or body is having its decisions reviewed.

The necessity of distinguishing the various groups was pointed up in *Stout v. Jenkins*,²⁶ where the facts stated in the opinion indicated that a zoning commission had granted a variance from the statutory scheme. However, this function is reserved to a board of adjustment. Although at one point the opinion indicated that a board granted the variance, subsequent language left this statement open to doubt. If the court used "board" and "commission" interchangeably, it committed an error since these are distinct agencies which have separate functions and powers.

(4) Type of action originally brought: The disposition of a planning and zoning case on appeal may depend on the nature of the suit from which the appeal arose. In referring to "nature of the suit," consideration must be given to such matters as whether the action was

²⁵ Formerly, planning and zoning statutes were applicable only to first and second class cities. Carroll's Ky. Stat. Anno. (Baldwin's 1936 Rev.) §§ 3037h-111 through -137; §§ 3235f-1 through -13. These provisions were repealed by Ky. Act 1942, ch. 176, at 709. This repealer also gave form to the present planning and zoning laws. Compare Ky. Acts 1942, ch. 176, at 709-52, with KRS ch. 100 (1959).

²⁶ 268 S.W.2d 643 (Ky. 1954).

instituted to declare an ordinance invalid, to enjoin enforcement of an ordinance, or to set aside the determination of a board or commission.

(5) Type of matter being reviewed: Particularly with respect to reviewing the grant of a variance, a court's attitude may depend on the type of variance sought. Although the statutes give unqualified authority to grant variances, the Kentucky court has prohibited the grant of a "use" variance.²⁷

(6) Interpretation of statutory review provisions: Kentucky authorizes three types of judicial review, each of which is separate and distinct from the others. Among these, provision is made for review by a trial de novo, and by a writ of certiorari. The actual scope of review under each provision may depend on the interpretation given to their respective meanings.

II. THE SPECTRUM OF JUDICIAL REVIEW

Between the extremes of complete preclusion of review and complete substitution of judicial judgment on all questions lie various "degrees" of judicial review. Professor Kenneth Davis' recent four volume work on administrative law²⁸ furnishes a point of departure to scan generally this spectrum of review.

The "substantial evidence" test, which is used in conjunction with the Federal Administrative Procedure Act (APA) section 10,²⁹ is substantially the same as the scope of review of jury verdicts.³⁰ In applying this test, the court decides questions of law but limits itself to a test of reasonableness in reviewing findings of fact.³¹ This may be distinguished from the broader power of review afforded by the "clearly erroneous" test under which the findings of a judge without a jury may be reviewed judicially.³² One of the apparent purposes of the APA was to insure that courts would not sustain findings when there was a mere scintilla of evidence to support them, no matter how lacking in probative force.³³

With respect to a review of inferences drawn by administrative agencies, the theory of the federal law is that the reviewing court may not substitute its judgment for that of the agency, unless the court

²⁷ *Arrow Transp. Co. v. Planning & Zoning Comm'n of the City of Paducah*, 299 S.W.2d 95 (Ky. 1956). See also note 15 *supra*.

²⁸ Davis, *Administrative Law Treatise* (1958).

²⁹ 60 Stat. 324 (1946), 5 U.S.C. § 1009 (1952).

³⁰ 4 Davis, *Administrative Law Treatise* § 29.02, at 120-21 (1958).

³¹ *Id.* § 29.01, at 114.

³² *Id.* § 29.02, at 121.

³³ *Id.* § 29.06, at 147-48.

chooses to treat the inference as a question of law and thereby remove it from administrative discretion.³⁴

The aforementioned substantial evidence test rests on a law-fact distinction. To obviate this distinction and determine the feasibility of substituting judicial judgment, some courts may apply a "rational basis" test. Where substitution of judicial judgment is deemed inappropriate, a court may declare that the administrative action must be upheld if it has warrant in the record, and a rational basis in law.³⁵ However, when a court sets a determination aside on the asserted ground that it is without a rational basis, the court itself may be unsure as to whether it has substituted its judgment.³⁶

Another formula is the "no basis in fact" test which has been used primarily in military draft cases. In the application of this test, courts may not weigh evidence to determine whether a finding was justified; an administrative determination must be sustained unless there is no basis in fact for it. Thus, something less than substantial evidence would sustain a finding.³⁷ Conversely, a trial or hearing *de novo* furnishes a broader review than that afforded by the substantial evidence test. In some *de novo* proceedings, a court may take its own evidence and use independent judgment on questions of law, fact, policy and discretion;³⁸ i.e., the court may substitute its judgment. Between the substantial evidence test and the complete substitution of judgment, a test may be applied to determine whether a finding is against the "manifest weight of evidence."³⁹

Judicial review may be made on the administrative record, or on a new record before the reviewing court. But once an administrative record is made, courts are reluctant to take testimony from the same witnesses, even when a statute expressly provides for a *de novo* review.⁴⁰ In applying the substantial evidence test, a reviewing court may consider the record in either of two respects. It may look at the evidence on both sides, (i.e., look at the whole record) and consider whatever detracts from the evidence it holds to be substantial. Otherwise, the court may look only at evidence on one side and appraise its substantiality when standing alone.⁴¹

A statute may be unconstitutional in providing too much review. Under article III of the federal constitution, a court may not hold a

³⁴ *Id.* § 29.05, at 141.

³⁵ *Id.* § 30.05.

³⁶ *Id.* § 30.13, at 264.

³⁷ *Id.* § 29.07, at 150; and see § 29.04, at 135.

³⁸ *Id.* § 29.07, at 152.

³⁹ *Id.* at 153.

⁴⁰ *Id.* § 29.08, at 152-53.

⁴¹ *Id.* § 29.03.

trial de novo to review non-judicial administrative actions. However, questions of law are still appropriate for judicial decision, and the doctrine becomes effective only if the court must exercise a legislative or administrative discretion.⁴² The problem may be evaded by interpreting a statute which expressly provides for de novo review to mean that only a more limited review may be had. Although a court may still determine whether an agency acted ultra vires, based its decision on substantial evidence, or conducted itself arbitrarily, it may not substitute its discretion for that of the agency.⁴³

In summary, there are at least six tests, standards or scopes of judicial review, viz., "substantial evidence"; "clearly erroneous"; "rational basis"; "no basis in fact"; "manifest weight of evidence"; and trial de novo.

III. THE TRIAL DE NOVO IN KENTUCKY PLANNING AND ZONING APPEALS

As previously mentioned, the Kentucky General Assembly revised the state's planning and zoning laws during its 1942 session. However, until the newly authorized system was placed in operation, first class cities retained their former power to enact zoning ordinances. Thus, where it appeared that the joint Louisville and Jefferson County planning and zoning commission had not been placed in operation by 1954, the authority of Louisville (a first class city) to enact ordinances during that year was upheld.⁴⁴

By comparison, *Willoughby v. Tafel*⁴⁵ indicated that the 1942 provisions for judicial review were effective immediately. In the *Willoughby* case, a variance had been granted soon after KRS Chapter 100 was enacted. An appeal to the circuit court was thereafter dismissed. The Court of Appeals held that it was not improper to dismiss the case, notwithstanding the statutory provision for trial de novo. In a strict sense, it was agreed that the circuit court should have rendered an independent judgment upon a de novo review. But since an independent judgment of the circuit court would have supported a grant of the variance anyhow, the Kentucky Court of Appeals declined to reverse the case on that point. Dismissal of the appeal by the circuit court was a harmless error.

⁴² *Id.* § 29.10, at 180-82.

⁴³ *Id.* at 184-86.

⁴⁴ See *City of Louisville v. Bryan S. McCoy, Inc.*, 286 S.W.2d 546 (Ky. 1955). Upon judicial review, the particular ordinance in controversy was deemed valid since it bore a reasonably substantial relation to the public health, morals, safety and general welfare. This test of validity was distinguished from the trial de novo which was provided to review the action of administrative zoning authorities. *Id.* at 548.

⁴⁵ 300 Ky. 792, 190 S.W.2d 475 (1945).

Although the new review provisions were effective immediately, their scope remained in doubt for many years; succeeding cases failed to resolve this doubt until 1954. For example, where the statutes authorized a trial de novo, a circuit court could still dispose of a case upon demurrer when facts in a statement of appeal would not, even if proved, entitle the appellant to relief.⁴⁶ Likewise, where the circuit court gave a de novo hearing, but based its decision on a commission's determination rather than an independent judgment, the Court of Appeals could nevertheless consider the case on appeal without remand.⁴⁷ Similarly, dictum in *Hill v. Kesselring*⁴⁸ seemed to advance the unarticulated proposition that the requirement of a trial de novo may be satisfied without a trial where statements or counsel disclose no cause of action or defense, or where they admit facts which preclude recovery by their client. In this case, a circuit court decision based on statements of counsel was reversed, not because a de novo hearing was denied, but because no evidence had been taken on a particular question which was put in issue.

More recently, the decision of *Louisville & Jefferson County Planning & Zoning Comm'n v. Cope*⁴⁹ involved consideration of a trial de novo in its fuller aspects. In this case, the appellee sought to have an unimproved twenty acre tract of land rezoned from "residential" to "commercial" so that it could be used for a shopping center. After an apparently uncontested hearing on the rezoning application, the appellant-commission rejected appellee's request. An appeal was then taken to the circuit court where, in a trial de novo, the judge made independent findings of fact and conclusions of law. The court decided that appellant's evidence was insufficient to justify a denial of appellee's "right" to rezoning, and that the proposed reclassification would have no adverse effect on the health, safety, morals or welfare of the community. The Kentucky Court of Appeals upheld the trial court's determination. It was held that the circuit court acts as an independent fact-finding body whose determinations will be reversed only if clearly erroneous.

The *Cope* case made no reference to cases such as *Schloemer v. City of Louisville*,⁵⁰ or *Fried v. Louisville & Jefferson County Planning &*

⁴⁶ *Thomson v. Tafel*, 309 Ky. 753, 218 S.W.2d 977 (1949).

⁴⁷ *Hamilton Co. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 287 S.W.2d 434 (Ky. 1955). Although this case was decided after 1954, it illustrates how problems under the "de novo provisions" have been presented to the Kentucky Court of Appeals, and how the court has avoided direct consideration of what a de novo hearing embodies.

⁴⁸ 310 Ky. 483, 220 S.W.2d 858 (1949).

⁴⁹ 318 S.W.2d 842 (Ky. 1958).

⁵⁰ 298 Ky. 286, 182 S.W.2d 782 (1944).

Zoning Comm'n,⁵¹ both of which were admittedly different on their facts and circumstances. While neither case involved a trial de novo, their underlying judicial philosophy or attitude toward planning and zoning decisions bears observation. In *Schloemer*, appellants unsuccessfully sought to obtain permission from the planning and zoning commission, as well as the board of adjustment, to establish a business in an area zoned residential by a municipal ordinance. In sustaining a denial of this permit, the Kentucky court declared that if reasonable minds should differ as to whether the restrictions have a substantial relation to public health, morals and welfare, the ordinance must stand. In the *Fried* case, there was a dispute as to the placement of a line separating commercial and residential property. In upholding a determination by the planning and zoning commission, the Kentucky Court of Appeals stated that placement of the line was a decision for the commission to make, and if it was based on reason and logic, the court would not substitute its judgment for that of the zoning authorities.

Unfortunately, the philosophy underlying *Schloemer* and *Fried* had been rejected in *Louisville & Jefferson County Planning & Zoning Comm'n v. Grady*,⁵² a forerunner of the *Cope* case. In *Grady*, an application for rezoning was denied, primarily because it would not conform with a comprehensive plan adopted by the commission. Upon a de novo review, the circuit court directed the commission to grant appellee's requested application. The Kentucky Court of Appeals sustained the circuit court; the *ratio decidendi* was that a hearing de novo meant trying the case anew, as though no decision had been rendered previously. Therefore, the substantial evidence rule was inapplicable, and the circuit court had to determine whether the evidence it heard preponderated (i.e., "tipped the scales") against the commission's decision. The *Fried* case was summarily overruled insofar as it was deemed inconsistent with *Grady*, and the *Schloemer* case was distinguished on the ground that it involved a direct attack on the zoning ordinance. However, this distinction is untenable.

Although a zoning ordinance may be attacked as unreasonable,⁵³ the *Schloemer* case merely involved a request for exemption from the rigid application of a particular ordinance; the ordinance itself was not under attack. The *Schloemer* case did not, as *Grady* would have us believe, involve the review of a legislative decision. This fact was recognized by the late Judge Sims, dissenting in *Arrow Transp. Co. v. Planning and Zoning Comm'n*.⁵⁴

⁵¹ 258 S.W.2d 466 (Ky. 1953).

⁵² 273 S.W.2d 563 (Ky. 1954).

⁵³ *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

⁵⁴ 299 S.W.2d 95, 97 (Ky. 1956).

When reduced to their fundamental elements, both *Schloemer* and *Fried* involved judicial review of decisions by a local administrative agency; however, neither case involved review by a trial de novo. The *Grady* and *Cope* cases also involved judicial review of decisions by a local administrative agency; but in addition, they involved review by de novo proceedings. Since the only real distinguishing characteristic between each pair of cases is the type of review, it appears that the judiciary's attitude toward planners' discretion depends solely upon whether the planners' decision is subject to a de novo review. Not only is this arbitrary distinction unjustified, but the *Grady* and *Cope* decisions will also tend to render local comprehensive plans virtually nugatory upon a mere tipping of the evidential scales against the planners' considered opinion.

The above contrast in judicial attitude is further illustrated by a case coming within Category 3. Richlawn, Kentucky (a sixth class city), was zoned entirely residential; however, appellee prevailed upon the circuit court to rezone certain property for commercial purposes. The court found that rezoning would cause no danger to the public health, safety, morals or welfare, and that the city had acted arbitrarily in denying the petition for rezoning. This holding was reversed in *City of Richlawn v. McMakin*.⁵⁵ In essence, the Kentucky court declared that the question is not whether rezoning would create a hazard to public health, morals, safety or welfare, but whether the existing ordinance bears a reasonable relation to a valid exercise of the police power.

These foregoing cases lead to the tentative conclusion that the Kentucky Court of Appeals will uphold any *reasonable* planning and zoning ordinance, regulation, or decision, in the absence of a de novo review by the circuit court. This analysis is buttressed by a 1938 decision which involved a first class city.⁵⁶ Before the Kentucky statutes authorized de novo review in Category 1, the grant of a variance was a matter of discretion which would not be disturbed in the absence of arbitrary and unreasonable action; furthermore, the existence of proper evidence before the board, and its acquaintance with the local situation and needs, could be presumed.

Since a trial de novo is available only in Category 1, it is evident that inequities may result under the existing statutes. The determination of a commission or board may be upheld as "reasonable" when reviewed within the framework of Category 2 or 3, but an identical determination may be set aside when reviewed under a Category

⁵⁵ 313 Ky. 265, 230 S.W.2d 902 (1950).

⁵⁶ *Selligman v. Western & So. Life Ins. Co.*, 277 Ky. 551, 559-60, 126 S.W.2d 419, 424 (1938).

1 trial de novo, notwithstanding the fact that it is manifestly reasonable. Why should an applicant's chance of avoiding established policy depend on the appellate review he secures? Perhaps uniformity could be obtained in all situations by providing a trial de novo in each of the three categories. But it is submitted that the trial de novo should be eliminated from the planning and zoning field.

Two additional cases merit consideration at this point. One, *Selligman v. Von Allmen Bros., Inc.*,⁵⁷ was decided in 1944—two years after the de novo provisions became operative. The board of adjustment denied an application for a variance, and the circuit court reversed this determination; the reported case did not indicate whether a trial de novo was provided. The Kentucky court reversed the circuit court and declared that the power to grant a variance rested in the board's discretion; the board's decisions should not be disturbed unless unreasonable and arbitrary. Does this mean that there is still an opportunity for the Kentucky court to reverse an independent determination by a circuit court, and reinstate the board's determination when it is no more than "reasonable"?

In considering the second case, it must be realized that under certain circumstances the functions of a city or county legislative body may be delegated to a planning commission. Thereafter, the commission's actions may be reviewed by a trial de novo. However, if the delegation is not made, an identical action by the local legislature cannot be reviewed in a de novo proceeding. Thus, where the fiscal court of a county containing a first class city effectuated a master plan by approving some construction work, when authority to grant such approval could have been delegated to the commission, there was no right of appeal to review the fiscal court's action. Although such an appeal would have been afforded if the legislative body had acted indirectly through the commission, the right to appeal is not inherent, and in the absence of governing constitutional provisions, it may be granted or withheld by the state General Assembly.⁵⁸

GENERAL RAMIFICATION OF A TRIAL DE NOVO

A majority of jurisdictions do not allow a trial de novo, and a planning or zoning (administrative) decision will ordinarily be deemed "final". However, a court may still review errors of law, determine whether there has been an abuse of discretion, or ascertain

⁵⁷ 297 Ky. 121, 179 S.W.2d 207 (1944).

⁵⁸ East Jeffersontown Improvement Ass'n v. Louisville & Jefferson County Planning & Zoning Comm'n, 285 S.W.2d 507 (Ky. 1953). Cf. note 95 *infra* and accompanying text.

whether the decision was arbitrary or oppressive.⁵⁹ On the legislative side, zoning ordinances are ordinarily upheld if they are reasonable, or if there is a fairly debatable question of reasonableness.⁶⁰

In Massachusetts, those aggrieved by the decision of a board of appeals may secure a hearing *de novo*; the judge may make his own findings of fact, independent of the board, and determine the validity of the board's decision.⁶¹ In reviewing the decision *de novo*, the judge may not adopt the board's determination as he might adopt the report of some judicial officer. The board's findings are no more than the report of an administrative body, and have no evidentiary weight on appeal.⁶² Once the court makes its findings of fact, it applies the law to the facts found. But when, for example, there is no legal compulsion to grant a variance, its issuance is a matter of discretion. So even with a trial *de novo*, the court may not invade the field of administrative discretion.⁶³

Elsewhere, hearings *de novo* have been accorded a similar, if not identical, interpretation. For example, Oklahoma subscribes to the view that such a hearing permits the court to make such judgment or order as the board of adjustment or appeal should have made.⁶⁴ And as previously indicated, Kentucky has committed herself to the view that a hearing *de novo* permits independent judicial fact-finding followed by a decision based upon a preponderance of evidence; such a decision will be upheld unless clearly erroneous.⁶⁵

But just as "judicial review" has many meanings, so too does the concept of trial *de novo*. Even when provision is made for a trial *de novo*, its meaning, scope, and effect may be eminently uncertain.

In Missouri, a case may be tried *de novo* so that the reviewing court can determine whether a board's order is illegal, arbitrary, capricious, or unreasonable; the court may not try the case *de novo* in order to substitute its discretion for that of the board.⁶⁶ Sometimes, a *de novo* hearing will be made *on the record*, and from that the reviewing court

⁵⁹ 2 Rathkopf, *Zoning & Planning* 204-11 (3d ed. 1957); 1 Yokley, *Zoning Law & Practice* § 177 (1953).

⁶⁰ Rhyne, *Municipal Law* 830 (1957). Or, as Mr. Justice Smith aptly stated, "[T]his Court does not sit as a super-zoning commission." *Robinson v. City of Bloomfield Hills*, 305 Mich. 425, 86 N.W.2d 166, 169 (1957).

⁶¹ *Marotta v. Bd. of Appeals*, 336 Mass. 199, 143 N.E.2d 270, 272 (1957); *Bicknell Realty Co. v. Bd. of Appeal*, 330 Mass. 676, 116 N.E.2d 570, 572-73 (1953).

⁶² *Devine v. Zoning Bd. of Appeals*, 332 Mass. 319, 125 N.E.2d 131, 133 (1954).

⁶³ *Pendergast v. Bd. of Appeals*, 331 Mass. 555, 120 N.E.2d 916, 918-19 (1954).

⁶⁴ *City of Tulsa v. Fred Jones Co.*, 203 Okla. 321, 220 P.2d 245, 248 (1950).

⁶⁵ See notes 49 & 52, *supra* and accompanying text.

⁶⁶ *Veal v. Leimkuehler*, 249 S.W.2d 491, 495-96 (Mo. Ct. App. 1952); *accord*, *Berard v. Bd. of Adjustment*, 138 S.W.2d 731, 734 (Mo. Ct. App. 1940).

must reach an independent conclusion.⁶⁷ Elsewhere, a trial de novo has been equated with the substantial evidence rule so that a reviewing court may only determine questions of law; viz., whether an administrative ruling is free from any illegality, and is reasonably supported by substantial evidence.⁶⁸

Another decision recognized two separate interpretations of trial de novo. It may mean a trial of appeals as if the case originated in the reviewing court; or it may mean that the parties are entitled to a trial de novo on the record made below—i.e., the court's review is limited either to questions of law, or to questions of law and fact, based on the record presented to it upon appeal.⁶⁹ Another restrictive interpretation of trial de novo is one which limits an appeal court to the determination of whether the administrative findings were against the weight of evidence.⁷⁰

In Connecticut, a court was formerly confined to facts actually or assumed to have been proven before an administrative agency when determining whether it acted arbitrarily, illegally, or in excess of its discretion. The only change wrought by a statutory authorization of de novo review was one which permitted the reviewing court to make a similar determination by conducting an independent inquiry.⁷¹

V. SHOULD KENTUCKY RETAIN ITS DE NOVO REVIEW?

It is submitted that the de novo review is a misguided effort to thwart the sound discretion of planners. The requirement of such review also prompts numerous questions. Doesn't it seem incongruous that decisions by planning administrators in cities of the first class are subject to a full scale de novo review, when decisions by planners in lower class cities are not subject to similar review? Ordinarily, a large city can better afford a more competent planning staff than can a small city, yet a court may overturn administrative decisions in the former more readily than it may in the latter. Aren't local planners more familiar with the long-range needs of the local area than are the courts? In view of the de novo provisions, why shouldn't we allow per-

⁶⁷ *Peterson v. Vasak*, 162 Neb. 498, 76 N.W.2d 420, 427 (1956); Cf. *Certain-Teed Products Corp. v. Paris Township*, 351 Mich. 434, 88 N.W.2d 705, 718 (1958).

⁶⁸ *Fire Dep't v. City of Fort Worth*, 147 Tex. 505, 217 S.W.2d 664, 666 (1949); *Simpson v. City of Houston*, 260 S.W.2d 94, 97 (Tex. Civ. App. 1953).

⁶⁹ *Denver & R.G.W.R. v. Public Serv. Comm'n*, 98 Utah 431, 100 P.2d 552, 554-55 (1940).

⁷⁰ *Chamber of Commerce v. Chicago, Rock Island & Pac. R.R.*, 220 Ark. 631, 249 S.W.2d 8, 9 (1952).

⁷¹ *De Mond v. Liquor Control Comm'n*, 129 Conn. 642, 30 A.2d 547 (1943). For further discussion and consideration of de novo review of administrative findings, see Note, 65 Harv. L. Rev. 1217 (1952).

sons to institute a cause of action in the circuit court in the first instance, rather than have them take a circuitous route through administrative agencies? Even the Kentucky court has questioned the wisdom of de novo review since local administrators have special technical and overall knowledge of zoning plans and their application.⁷²

Kentucky maintains the tenuous distinction that matters such as a zoning commission's denial of a request to reclassify certain land must bear a substantial relation to the local police power, as borne out by a trial de novo,⁷³ whereas an ordinance will be presumed valid and upheld without a trial de novo when reasonable minds may differ as to whether it has a substantial relation to a valid exercise of the police power.⁷⁴ This latter view reflects the attitude that courts should not undo the careful thought that has gone into a zoning arrangement projected by planning authorities and implemented by action of the governing body in passing necessary zoning ordinances.⁷⁵ Since this seems to be the desirable approach for reviewing planners' decisions, the Kentucky Court of Appeals should find a method to circumvent the apparently broad statutory requirement of de novo review.

Section 27 of the Kentucky Constitution provides for the separation of powers between the executive, legislative, and judicial branches of the state government. By virtue of sections 135 and 109, the judicial powers of the state are vested solely in the constitutional courts.

It is often difficult to label an administrative agency either "legislative" or "judicial", since it may partake of the nature of both and act in a quasi-judicial or quasi-legislative manner. When an administrative body exercises a "legislative discretion", it would appear to be inappropriate for a judicial court to hold a trial de novo and substitute its own opinion on the matter. This theory is exemplified by *California Co. v. State Oil & Gas Board*.⁷⁶ When an administrative agency makes permissible exceptions to a general legislative rule (analogous to the granting of variances as a permissible exception to ordinances), it acts at least in a quasi-legislative capacity. A reviewing court may still determine whether the permissible exception was supported by substantial evidence, or whether it was arbitrary, ultra vires, or unconstitutional; in this respect, the court is acting judicially. However, in view of the "separation of powers" doctrine, the reviewing court may not provide a trial de novo and substitute its own opinion on matters of legislative discretion.

⁷² *Hamilton Co. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 287 S.W.2d 434, 436 (Ky. 1956).

⁷³ *Id.* at 436-37.

⁷⁴ *City of Louisville v. Bryan S. McCoy, Inc.*, 286 S.W.2d 546 (Ky. 1956).

⁷⁵ See *Tzses v. Bd. of Trustees*, 22 N.J. Super. 45, 91 A.2d 588, 596 (1952).

⁷⁶ 200 Miss. 824, 27 So.2d 542 (1946).

When a board or commission grants discretionary relief in the nature of variances or exceptions to a zoning ordinance, or when it grants relief sought on special applications, the board or commission acts in a quasi-legislative manner. Instead of dealing with judicial facts, it is extensively engaged in matters of legislative policy. Notwithstanding provisions for a trial *de novo*, a reviewing court should do no more than examine questions of law.

Certain objections to this approach may be anticipated. The Kentucky court has stated that the board of adjustment is a quasi-judicial body with limited powers, and that proceedings before it are informal and of a similar quasi-judicial nature.⁷⁷ The fact that a board's *hearings* are quasi-judicial, however, is immaterial. As for the board itself, while it may be quasi-judicial in one sense, it may be quasi-legislative in still another. The enactment, formulation, and promulgation of planning and zoning orders, regulations, ordinances, or classifications tend to be legislative rather than judicial in character.⁷⁸ While the planners' hearings may be quasi-judicial, their basic function is quasi-legislative. Although this argument may appear anomalous, the United States Supreme Court has recognized the possible existence of quasi-judicial proceedings that look toward legislative action.⁷⁹

Another objection to the "separation of powers" theory may arise on the alleged ground that the power to zone property within a city cannot be delegated to a board of adjustment.⁸⁰ Thus, two cases have held that where the grant of a variance would virtually change property from one classification to another when no hardship exists, it would effectively amend or repeal the zoning ordinance and be an invalid usurpation of power.⁸¹ From this it might be inferred that a board could never possess legislative powers, and that a court would not be exercising a legislative function in substituting its judgment for the board's determination. However, the cases upon which this conclusion rests involved an attempt to evade the express provisions of a statute. Read in context, it was apparent that the Kentucky court

⁷⁷ *Hamilton Co. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 287 S.W.2d 434, 436 (Ky. 1955); *Goodrich v. Selligman*, 298 Ky. 863, 866-67, 183 S.W.2d 625, 627 (1944); 1 *Yokley, Zoning Law & Practice* § 127 (1953).

⁷⁸ *Kutcher v. Town Planning Comm'n*, 138 Conn. 705, 88 A.2d 538, 540 (1952); *State ex rel. Christopher v. Matthews*, 362 Mo. 242, 240 S.W.2d 934, 938 (1951); *Colt v. Bernard*, 279 S.W.2d 527, 530 (Mo. Ct. App. 1955); *Cleveland Trust Co. v. Village of Brooklyn*, 92 Ohio App. 351, 110 N.E.2d 440, 444-45 (1952); *Horack & Nolan, Land Use Controls* 36 (1955). Cf. *Fowler v. Obier*, 224 Ky. 742, 760, 7 S.W.2d 219, 226-27 (1928); 1 *Davis, Administrative Law Treatise* § 2.08, at 108, & § 2.09 (1958).

⁷⁹ *Morgan v. United States*, 298 U.S. 468, 479-81 (1936).

⁸⁰ *Bray v. Beyer*, 292 Ky. 162, 166, 166 S.W.2d 290, 292 (1942).

⁸¹ *Arrow Transp. Co. v. Planning & Zoning Comm'n*, 299 S.W.2d 95 (Ky. 1956); *Bray v. Beyer*, 292 Ky. 162, 166 S.W.2d 290 (1942).

wanted to prevent the grant of a "use" variance although the statutes granted unqualified authority for the board to permit any variance it desired. The decision itself is questionable. As the late Judge Sims indicated in a dissenting opinion, to disturb the board's decision when it acts within its statutory power to grant variances is to emasculate the statute and virtually abolish the board.⁸² Generally, the granting of variances is universally upheld as a proper administrative function, and it is submitted that neither of the foregoing Kentucky cases may be considered as strong precedent against the delegation of legislative powers. Abuse in the granting of variances could be enjoined by withdrawing the board's authority to grant variances,⁸³ or by prescribing a standard of "reasonableness" which permeates all phases of the law.

Even if the Kentucky court is unwilling to follow the "separation of powers" doctrine, it may still restrict the scope of review under the *de novo* provisions. Reference is made to Part IV of this note for varied and restrictive interpretations of "trial *de novo*."

VI. JUDICIAL REVIEW IN CATEGORIES 2 AND 3

CASE CONSIDERATIONS

A. *Second Class Cities*

There is a relative dearth of cases relating to judicial review as applied to cases within Category 2. However, under review provisions similar to those which are now in effect, it has been held that where an administrative decision is reviewed upon an original record certified to the court, the case must be heard upon the original record to determine whether there was probative evidence to support the decision. The court has no right to hear additional evidence on the merits.⁸⁴ Similarly, in considering the pertinent part of a former statute⁸⁵ which was substantially incorporated in KRS section 100.490, the Kentucky court held that a judicial determination upon review of a decision by the board of adjustment is limited to a consideration of the record as certified to the court by the board.⁸⁶

Perhaps *Hatch v. Fiscal Court*⁸⁷ is Kentucky's leading case in this category. It recognized that there was no statutory provision specifically authorizing review of the findings of a zoning commission of a second class city; however, the court stated that there is a limited inherent

⁸² *Arrow Transp. Co. v. Planning & Zoning Comm'n*, 299 S.W.2d 95, 97-98 (Ky. 1956).

⁸³ See *Horack & Nolan, Land Use Controls* 176 & n.47 (1955).

⁸⁴ *Barnes v. Turner*, 280 S.W.2d 185, 187 (Ky. 1955).

⁸⁵ *Carroll's Ky. Stat. Ann. (Baldwin's 1936 Rev.)* § 3235f-9a.

⁸⁶ *Bosworth v. City of Lexington*, 277 Ky. 90, 104-05, 125 S.W.2d 995, 1002 (1939).

⁸⁷ 242 S.W.2d 1018 (Ky. 1951).

power to prevent an administrative body from proceeding illegally, arbitrarily, or capriciously.⁸⁸

In another area, it has been held that a board's action in denying an application to improve certain premises should be upheld so long as the board did not act in an arbitrary, capricious, or dictatorial manner.⁸⁹ This holding is predicated on the notion that, although no harm would result from the particular contemplated change, it may be that under a long-range view an exception here would lead to similar changes elsewhere and thereby defeat some of the objectives of zoning.

B. *Third Through Sixth Class Cities*

Perhaps it is an overstatement to say that a trial de novo is afforded only for review of decisions falling within Category 1. Ostensibly, the breadth of review afforded on appeal from planning and zoning decisions rests on a descending scale from Category 1 through Category 3; i.e., from a trial de novo, to a limited right of appeal, to a discretionary review by writ of certiorari. Once the writ is granted, however, the scope of review may exceed all apparent bounds. In construing a Florida statute⁹⁰ substantially the same as KRS section 100.590, it has been held that the procedure partakes of the nature of an original trial de novo whereby the judge may take evidence and make an independent original determination of the correctness of an appeal board's determination.⁹¹

Kentucky cases which involve or discuss judicial review within Category 3 are, like those in Category 2, somewhat scarce. The *City of Richlawn* case⁹² involved a direct attack on an ordinance. Suit was brought for an injunction, and an appeal was taken from a judgment granting the relief sought. It was not a case of judicial review by certiorari provided by KRS section 100.590. Another case which involved an appeal under a former statute⁹³ providing for review by a writ of certiorari turned upon the interpretation of a particular phase.⁹⁴ The case of *Byrn v. Beechwood Village*,⁹⁵ which upheld an amendment to a municipal ordinance when it was apparently reasonable, involved an appeal from a suit for injunction. Again, there was no re-

⁸⁸ Cf. *Long v. Zoning Comm'n*, 133 Conn. 247, 50 A.2d 172, 174 (1946), where it was stated that there can be no appeal from decisions of a zoning commission unless a statute provides for such appeal.

⁸⁹ *Moore v. City of Lexington*, 309 Ky. 671, 218 S.W.2d 7 (1948).

⁹⁰ Fla. Stat. §§ 176.16-.19 (1955).

⁹¹ *Josephson v. Autrey*, 96 So.2d 784 (Fla. 1957).

⁹² *City of Richlawn v. McMakin*, 313 Ky. 265, 230 S.W.2d 902 (1950).

⁹³ Carroll's Ky. Stat. Ann. (Baldwin's 1936 Rev.) § 3037h-122.

⁹⁴ *Goodrich v. Selligman*, 298 Ky. 863, 183 S.W.2d 625 (1944).

⁹⁵ 253 S.W.2d 395 (Ky. 1952).

view by certiorari proceedings. Since there was no provision for appeal from the legislative determination (i.e., the ordinance), the aggrieved party had to resort to the equitable jurisdiction of courts for relief.

Hence, there appears to be no decisive Kentucky case as to the nature and scope of review afforded by statutory provisions within Category 3. Perhaps it will be held that findings of fact are not open to revision, and that only errors of law may be reviewed.⁹⁶

VII. BURDEN OF PROOF ON APPEAL

In upholding the denial of a variance by a zoning board, the Connecticut court has recognized that the board must necessarily be vested with wide discretion, and has declared that the burden of proof is on the one attacking the board's determination to show that the agency acted improperly.⁹⁷

In Kentucky, the statutory provisions for judicial review in Category 1 require the circuit court to issue a "show cause" order. This has been construed to mean that the one against whom the order was directed has the burden of proof to sustain the particular determination; i.e., the burden of proof is upon the agency making the determination, rather than on the one attacking it.⁹⁸

In considering ordinances, the law presumes an ordinance is valid, and the one attacking it must show its invalidity. If reasonable minds may differ as to whether the ordinance is a valid exercise of power, it must be upheld.⁹⁹ A similar result obtains in cases involving judicial review decisions of a zoning commission in Category 2. The commission's action is presumed to be reasonable, and in accordance with law; it is incumbent upon the party attacking such decision to make a clear showing of unreasonableness.¹⁰⁰

VII. CONCLUSION

The scope of judicial review, by which Kentucky planning and zoning decisions are examined, is dependent upon several variable factors. The necessity for this variation is difficult to comprehend.

⁹⁶ *Brackett v. Bd. of Appeal of Bldg. Dep't*, 311 Mass. 52, 39 N.E.2d 956, 957 (1942); *Bradley v. Bd. of Zoning Adjustment*, 255 Mass. 160, 150 N.E. 892, 893-94 (1926).

⁹⁷ *Talmdage v. Bd. of Zoning Appeals*, 141 Conn. 639, 109 A.2d 253, 254 (1954).

⁹⁸ *Boyd v. Louisville & Jefferson County Planning & Zoning Comm'n*, 313 Ky. 196, 230 S.W.2d 444 (1949).

⁹⁹ *City of Louisville v. Puritan Apartment Hotel Co.*, 264 S.W.2d 888, 890 (Ky. 1954).

¹⁰⁰ *Hatch v. Fiscal Court*, 242 S.W.2d 1018, 1021 (Ky. 1951).

In order to avoid confusion and promote uniformity in this field, the following adjustments to existing law are deemed advisable:

1. The statutory requirement for de novo review should be legislatively repealed or judicially emasculated.

2. The scope of judicial review of planning and zoning decisions should be the same regardless of city classification; i.e., the extent of judicial review should be the same in Categories 1, 2, and 3.

3. Both administrative and legislative determinations should be tested by the same standard. Although members of a legislative body are normally elected and held accountable at the polls, both boards and commissions operate under legislative sanction. Their powers may be expanded or contracted by an appropriate ordinance or statute. The fact that administrators are not subject to political pressures may enable them to take a more objective approach to their work.

4. An administrative or legislative determination of fact should be upheld if it is supported by "substantial evidence." If the justification of a particular determination is "fairly debatable," the determination should be upheld.¹⁰¹ In other words, rather than test the validity of a decision by the "preponderance of evidence," determine whether a reasonable board acting reasonably could have reached the particular decision.

5. Judicial review should be limited to a determination of whether the planners acted illegally, arbitrarily, or unreasonably.

6. Judicial review should be restricted to an examination of the "whole record." If no record was made, permit the reviewing court to take additional evidence only to the extent necessary for it to execute its prescribed function.

7. A rebuttable presumption should be established that planning and zoning decisions are valid. One who attacks such a decision would then have to sustain the burden of proving its invalidity.¹⁰²

The foregoing recommendations obviously favor the role played by planners—both legislative and administrative. But if we are going to

¹⁰¹ This is analogous to a trial judge's role in disposing of a motion for a judgment non obstante veredicto. Although the judge may personally disagree with the ultimate factual conclusion evinced by a jury verdict, he cannot set it aside if supported by some credible evidence. Childs, "Local Government Law-Zoning," 5 Wayne L. Rev. 36, 44 (1958).

¹⁰² Zoning without reasonable stability is, perhaps, worse than no zoning at all. If the zoning laws of any community are to be effective; if a community is to have a zoning law on which its citizens can rely; if the community is to have a zoning law under which residential districts can be established with sufficient stability to justify investments in homes with confidence that the residential districts will be protected by the zoning law—the zoning law must be protected by a legal presumption of validity so that the courts may not upset the law except in cases where the action of the zoning body is clearly arbitrary and unreasonable. In reasonably debatable situations, the zoning law must be upheld.

hire specialists to do planning and zoning work, why must the courts, which do not claim special competence in the matter, be called upon to make decisions which may ultimately do violence to a long-range planning objective? There is no requirement for a community to establish a program or system of planning and zoning. Once such a system is adopted, however, the planners should be given wide discretion to accomplish the purpose for which they were engaged.

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